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U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515-6115

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July 29, 2004

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BUD ALBRIGHT, STAFF DIRECTOR

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: NEC BNS Waiver Request, Enforcement File No. EB-03-IH-0738
Public Notice No. DA 04-2034

Dear Chairman Powell:

The Committee on Energy and Commerce, exercising its jurisdiction over telecommunications issues and the Federal Communications Commission (FCC), has conducted for the last year-and-a-half an investigation of waste, fraud, and abuse in the E-rate program. We write to provide comment on NEC Business Network Solutions' (NEC BNS) petition for waiver of Section 54.521 of the FCC's rules requiring NEC BNS's suspension and debarment from participation in the E-rate program. For the reasons detailed below, we recommend that the FCC not grant NEC BNS a waiver.

The FCC's Rule 54.521 requires the suspension and debarment of any person convicted or found civilly liable of fraud or other criminal offenses arising out of activities associated with or related to the schools and libraries support mechanism, absent extraordinary circumstances. Its adoption last year was long overdue. Information obtained in this investigation and testimony at our hearings indicate a disturbing pattern of exploiting a program intended to serve our nation's schoolchildren. The waste, fraud, and abuse of the E-rate program we have seen to date suggest that bad actors have little disincentive to engage in wasteful, and even fraudulent, actions.

NEC BNS pleaded guilty to felonious conduct and agreed to pay a \$20.7 million fine. This conduct included participating in a conspiracy to rig bids and submit E-rate applications with grossly inflated contract costs for reimbursement from the E-rate program and the schools. This is egregious conduct, particularly in connection with a program that is intended to serve our nation's schools. Given the magnitude and scope of this particular conspiracy, we are concerned that granting a waiver of debarment to NEC BNS could undermine the credibility and authority of the debarment provision.

On July 22, 2004, the Committee's Subcommittee on Oversight and Investigations held a hearing to review the E-rate program in San Francisco, California. As you know, San Francisco Unified School District (SFUSD) was one of the school districts in which NEC BNS pleaded guilty to conspiring to rig bids and submit E-rate applications with inflated prices. According to the plea agreement, NEC BNS was part of a conspiracy with another company, named Video Network Communications, Inc. (VNCI), that inflated E-rate funding applications for SFUSD by \$26 million. In order to gather all pertinent facts from the school district and the vendors involved, the Subcommittee sought to interview, among others, NEC BNS's President and Chief Executive Officer Mr. Thomas Burger. Mr. Burger refused to be interviewed. The Subcommittee then invited Mr. Burger to attend the July 22, 2004, hearing and provide testimony, and when he declined the invitation, the Committee issued a subpoena compelling his attendance. Mr. Burger, as well as Mr. William Holman, the former Vice President of Sales for NEC BNS whose appearance was also compelled by subpoena, both refused under advice from counsel, to testify on this matter, invoking their Fifth Amendment rights.

Thus, while the company has reached a plea agreement with the Justice Department, and, in its petition, attributes its illegal activities to a few bad actors, some of the highest-ranking officials who were responsible for assuring the integrity of the firm's business practices declined to provide the Committee with testimony about NEC BNS's conduct in connection with the E-rate program. We cannot determine which company officers had knowledge of the bid-rigging conspiracy. Finally, the exceedingly limited testimony provided by a former NEC BNS officer during the hearing, and our extensive document review, revealed no evidence whatsoever that anyone within NEC BNS attempted to halt or expose the criminal behavior before San Francisco City Attorney and federal investigators began their scrutiny of the company's E-rate transactions.

In its petition, NEC BNS cites as precedent for waiving debarment the FCC's decision in the case regarding the Puerto Rico Department of Education (PRDOE), arguing that despite the conviction of the former Puerto Rico Secretary of Education, the FCC "decided not to debar PRDOE." In our view, this analogy is completely misplaced. NEC BNS' petition conveniently neglects to point out that Puerto Rico's Secretary of Education was convicted for illegal activities completely unrelated to the E-rate program. Moreover, the only effect of the debarment of PRDOE would be the injury of the intended beneficiaries of the program – the Commonwealth's schoolchildren. In contrast, debarment of NEC BNS does not impair the program or deny its benefits to the intended recipients, because other vendors will inevitably respond to school districts' work proposals and compete for the opportunities to conduct that work.

As the rule sets forth, a limitation or waiver of a suspension and debarment is permitted, but only upon a showing of extraordinary circumstances. The rule expressly cites reversal of a criminal conviction as an example of extraordinary circumstances; in this case, NEC BNS is seeking a waiver essentially for admitting to criminal conduct, paying restitution, and agreeing to cooperate with the

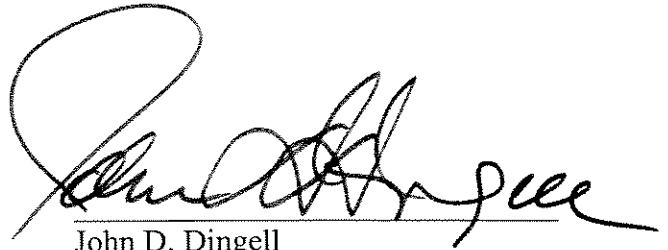
Justice Department, to avoid going to trial. In our view, NEC BNS has failed to demonstrate the extraordinary circumstances warranting a waiver from debarment following its conviction for a nationwide bid-rigging scheme related to the E-rate program. Our experience to date suggests that the FCC should not grant the waiver to NEC BNS or any other company whose cooperation occurs only after they have been caught with their hands in the E-rate "cookie jar." To do so would seriously undermine the substance of the debarment rule's purpose.

Please include this letter in the official docket regarding NEC BNS's petition for waiver from debarment.

Sincerely,



Joe Barton
Chairman



John D. Dingell
Ranking Member

cc: The Honorable Kathleen Q. Abernathy
The Honorable Jonathan S. Adelstein
The Honorable Michael J. Copps
The Honorable Kevin J. Martin
Secretary, Office of the Secretary, Federal Communications Commission
Mr. Paul Nagle, Office of Legislative Affairs, Federal Communications Commission